Supreme Court, U.S.
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No. 00-

IN THE
Supreme Court of the United States

LONNIE A. YOUNG and
STEPHEN A. CARRUTHERS,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

J. MICHAEL CRANFORD
Attorney for Petitioners
P.O. Box 3324
Macon, Georgia 31205-3324
(478) 746-0704

163853

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

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QUESTIONS PRESENTED

Whether the Court of Appeals for the Eleventh Circuit's local rules 36-1 and 36-2 are in violation of Article III of the United States Constitution.

Whether the district court violated the petitioners' Fourth and Sixth Amendment rights under the United States Constitution by denying their motions to suppress evidence seized.

Whether the government's witness, Dr. Bruner, qualified as an expert under Rule 702 of the Federal Rules of Evidence and the standards set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 U.S. 2786 (1993)

Whether the district court erred in refusing to disqualify a potential juror as a matter of law who could neither read nor write the English language to the proficiency required under 28 U.S.C. §§ 1865(b)(2) & (4).

Whether the district court violated the petitioners; rights under *Jacobson v. United States*, 503 U.S. 540 (1992) in not finding that petitioners were entrapped as a matter of law.

Whether the district court violated the ex post facto laws under Article I par. 10 of the United States Constitution.

Whether the petitioners' rights under the Eighth Amendment of the United States Constitution were violated by the forfeiture of their residence and other property.

TABLE OF CONTENTS

Page

Questions Presented i

Table of Contents ii

Table of Cited Authorities iv

Table of Appendices viii

Opinions Below 1

Statement of Jurisdiction 1

Constitutional, Statutory and Federal Provisions and Rules of Court Involved 2

Statement of the Case 7

A. Proceedings Below 8

Reasons for Granting the Writ 11

I. Local Rules 36.1 And 36.2 Court Of Appeals For The Eleventh Circuit Operate To Deprive Petitioners Of Their Constitutional Rights. 11

II. The District Court Erred In Refusing To Disqualify A Potential Juror Who Could Neither Read Nor Write The English Language To The Proficiency Required Under 28 U.S.C. §§ 1865(b)(2) & (4). 13

Contents

Page

III. The District Court Erred In Denying Petitioners Motions To Suppress Evidence Seized In Violation Of The Fourth And Six Amendments Of The United States Constitution. 15

IV. The District Court Erred In Allowing Dr. Barbara Bruner To Testify As An Expert Witness. 17

V. The District Court Erred In Not Finding That The Petitioners Were Entrapped As A Matter Of Law. 18

VI. The District Court Erred In The Sentencing Of The Petitioners In Violation Of The Ex Post Facto Law. 19

VII. The Forfeiture Of The Petitioners' Residence And Other Property Was Unduly Harsh And In Violation Of The Eighth Amendment To The United States Constitution. 21

Conclusion 23

TABLE OF CITED AUTHORITIES

Page

Cases:

Anastasoff v. United States, 99-3917 EM (August 22, 2000) 12, 13

Austin v. United States, 113 U.S. 2801 (1993) 22

Cannady v. Dugger, 931 F.2d 752 (11th Cir. 1991) 16

Caremell v. Texas, 530 U.S. __ (2000) 20

Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 U.S. 2786 (1993) 17,18

Dickerson v. United States, 530 U.S. __ (2000) ... 16

Jacobson v. United States, 503 U.S. 540, 112 S. Ct. 1535, 118 L. Ed. 2d 174 (1992) ..... i, 18

Kumho Tire Co., LTD., et al. v. Carmichael et al., 526 U.S. 137 (1999) 18

Miranda v. Arizona, 384 U.S. 436, 88 S. Ct. 1602, 16 L. Ed. 2d 694 (1966) 16

United States v. Chandler, 36 F.3d 365 (4th Cir. 1994) 22

United States v. Lovar-Rico, 61 F.3d 1529 (11th Cir. 1995) 16

Cited Authorities

Page

United States v. Martinez-Salazar, 2000 WL 33449 (2000) 14

United States v. One Ford Ranger Truck, 888 F. Supp. 1170 (1995) 22

United States v. Saucedo, 950 F.2d 1508 (10th Cir.), *overruled on other grounds, Stinson v. United States*, 113 U.S. 1913 (1993) 20

United States v. Skarie, 971 F.2d 317 (9th Cir. 1992) 19

United States Constitution:

Article I ..... i, 2, 19

Article III ..... i, 2, 12

Fourth Amendment 2, 16

Fifth Amendment 2, 12

Sixth Amendment ..... i, 2, 3, 15

Eighth Amendment ..... i, 2, 3, 21

Cited Authorities

Page

Statutes:

18 U.S.C. § 2252(a)(2) 1, 3, 8

18 U.S.C. § 2252(a)(4)(B) 1, 4, 8

18 U.S.C. § 2253(a) 1, 4

18 U.S.C. § 2253(a)(1) 8

18 U.S.C.A. § 2421, *et seq.* 4

19 U.S.C.A. § 2251, *et seq.* 4

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1865(b) 11

28 U.S.C. § 1865(b)(2) ..... i, 5, 7, 13

28 U.S.C. § 1865(b)(4) ..... i, 13

Rules:

Federal Rule of Appellate Procedure 40 1

Federal Rule of Evidence 702 ..... i, 17

11th Cir. Rule 36.1 ..... i, 11, 13

11th Cir. Rule 36.2 ..... i, 6, 11, 13

United States Supreme Court Rule 13.4 1

Cited Authorities

Page

Other Authorities:

U.S.S.G. 2(g)2.2(a) 5, 20

U.S.S.G. 2(g)2.2(b)4 ..... 6, 20

TABLE OF APPENDICES

Page

Appendix A — Per Curiam Order Of The United States Court Of Appeals For The Eleventh Circuit Dated And Filed June 30, 2000 ..... 1a

Appendix B — Per Curiam Opinion Of The United States Court Of Appeals For The Eleventh Circuit Dated And Filed July 30, 1999 ..... 3a

Appendix C — Excerpts From Evidentiary Hearing Of The United States District Court For The Middle District Of Georgia, Macon Division Dated December 6, 1999 ..... 9a

Appendix D — Judgment Of The United States District Court For The Middle District Of Georgia Re *United States Of America v. Lonnie Andrew Young* Dated And Filed January 26, 1998 ..... 11a

Appendix E — Judgment Of The United States District Court For The Middle District Of Georgia Re *United States Of America v. Stephen A. Carruthers* Dated And Filed January 26, 1998 ..... 22a

Appendix F — Excerpts From Sentencing Hearing Of The United States District Court For The Middle District Of Georgia, Macon Division Dated January 14, 1998 ..... 33a

Appendices

Page

Appendix G — Order Of The United States District Court For The Middle District Of Georgia, Macon Division Denying Motion For New Trial Dated And Filed December 30, 1997 ..... 42a

Appendix H — Order Of The United States District Court For The Middle District Of Georgia, Macon Division Dated And Filed January 16, 1997 .... 57a

Appendix I — Per Curiam Order Of The United States Court Of Appeals For The Eleventh Circuit Denying Petition For Rehearing Dated And Filed September 12, 2000 ..... 64a

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

On July 30, 1999, the Court of Appeals for the Eleventh Circuit issued a six page remand with instructions. The remand was unpublished, and a copy of the decision is included with this petition as Appendix B. On December 6, 1999, the District Court issued a ruling declaring that venireman Feagin did not meet the statutory literacy standard to qualify as a federal juror. A copy of the ruling is included with this petition as Appendix C. On June 30, 2000, the Court of Appeals for the Eleventh Circuit affirmed the judgment and sentence of the Petitioners Lonnie A. Young and Stephen A. Carruthers for two Counts violation of 18 U.S.C. § 2252(a)(2); one Count violation of 18 U.S.C. § 2252(a)(4)(B) and one Count violation of 18 U.S.C. § 2253(a). The decision of the Eleventh Circuit was unpublished, and a copy of the slip decision is included with this petition as Appendix A. The Petitioners timely Petition for rehearing and suggestion of rehearing (or hearing) *en banc* under Fed. R. App. P. 40 was denied on September 12, 2000. A copy of the order denying the Petition for Rehearing in the Court of Appeals is included as Appendix I.

STATEMENT OF JURISDICTION

The order of the Court of Appeals for the Eleventh Circuit denying Mr. Young's and Mr. Carruthers' Petitions for Rehearing were entered on September 12, 2000. This Petition for Writ of Certiorari is filed within ninety days of that date, pursuant to Supreme Court Rule 13.4. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY AND FEDERAL PROVISIONS AND RULES OF COURT INVOLVED

This case involves the Fourth, Fifth, Sixth, Eighth Amendment of the United States Constitution; Article I and Article III of the United States Constitution.

Article I par. 10 states in pertinent part:

> No state shall . . . pass any bill of attainder, ex post facto law, or law impinging the obligations of contracts . . .

Article III states in pertinent part:

> The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

The Fourth Amendment states in pertinent part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment states in pertinent part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . .

The Sixth Amendment states in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense.

The Eighth Amendment states in pertinent part:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

18 U.S.C. § 2252(a)(2) provides:

> (2) knowingly receives, or distributes, any visual depiction that has been mailed, or has been shipped or transported in interstate or foreign commerce, or which contains materials which have been mailed or so shipped or transported, by any means including by computer, or knowingly reproduces any visual depiction for distribution in interstate or foreign commerce by any means including by computer or through the mails, if —
>
> > (A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and
> >
> > (B) such visual depiction is of such conduct;

18 U.S.C. § 2252(a)(4)(B) provides:

> (B) knowingly possesses one (1) or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction that has been mailed, or has been shipped or transported in interstate or foreign commerce, or which was produced using materials which have been mailed or so shipped or transported, by any means including by computer, if —
>
> > (i) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and
> >
> > (ii) such visual depiction is of such conduct; shall be punished as provided in subsection (b) of this section.

18 U.S.C. § 2253(a) provides:

> (a) *property subject to criminal forfeiture.* — A person who is convicted of an offense under this chapter [19 U.S.C.A. § 2251, *et seq.*,] involving a visual depiction described in section 2251, 2251A, 2252, 2252A, or 2260 of this chapter, or who is convicted of an offense under section 2421, 2422, or 2423 of chapter 117 [18 U.S.C.A. § 2421, *et seq.*], shall forfeit to the United States such person's interest in—
>
> > (1) any visual depiction described in section 2251, 2251A, or 2252 of this

> chapter, or any book, magazine, periodical, film, videotape, or other matter which contains any such visual depiction, which was produced, transported, mailed, shipped or received in violation of this chapter;
>
> (2) any property, real or personal, constituting or traceable to gross profits or other proceeds obtained from such offense; and
>
> (3) any property, real or personal, used or intended to be used to commit or to promote the commission of such offense.

28 U.S.C. § 1865(b)(2):

> (b) . . . shall deem any person qualified to serve on grand and petit juries in the district court unless he —
>
> (2) is unable to read, write, and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form;

U.S.S.G. 2(g)2.2(a) provides

Base Offense Level: 17

U.S.S.G. 2(g)2.2(b)4 provides:

> If the defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor, increase by 5 levels.

11th Cir. R. 36-1 *Affirmance Without Opinion*:

> When the court determines that any of the following circumstances exist:
>
> > (a) the judgment of the district court is based on findings of fact that are not clearly erroneous;
> >
> > (b) the evidence in support of a jury verdict is sufficient; . . .
> >
> > (e) the judgment has been entered without a reversible error of law; and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

11th Cir. R. 36-2 *Unpublished Opinions*:

> An opinion shall be unpublished unless a majority of the panel decides to publish it. Unpublished opinions are not considered binding precedent. They may be cited as persuasive authority, provided that a copy of the unpublished opinion is attached to or incorporated within the brief, petition, motion or response in which such citation is made.

STATEMENT OF THE CASE

Postal Inspectors for the United States arrested Lonnie Northcutt on child pornography charges, and a short time after this incident the postal inspectors assumed the identity of Mr. Northcutt. For the next three years the postal inspector, while posing as Mr. Northcutt, began corresponding with the Petitioners Young and Carruthers. During these three years several correspondence were exchanged in the form of letters and or post cards. Additionally, legal adult pornographic video tapes were exchanged between the petitioners and the government. On several occasions the government asked if the petitioners were interested in a "nephew tape" with a young boy in it, and on each occasion the petitioners replied no. After nearly 3 years of correspondence and exchanging of adult video tapes the government wrote petitioners about some new adult tapes and again mentioned the "nephew tape". The petitioners' sent a post card to the government stating "we would enjoy your tapes". It has been the petitioners' position throughout the trial of this case that they did not request the "nephew tape", as they had no predisposition to child pornography. They were only interested in adult tapes such as the ones they had been exchanging for three years. The petitioners were subsequently arrested and indicted. The trial began on April 7, 1997.

During voir dire and jury selection it became apparent to counsel for the petitioners that prospective juror Feagin did not meet the statutory requirement under 28 U.S.C. § 1865(b)(2). Counsel for petitioners moved for the juror to be struck as a matter of law because he did not qualify as a juror, and the district court refused, citing that it did not believe that the ability to read and write the English language was a requirement to sit as a juror.

After a five-day trial, a jury verdict was reached finding the defendants guilty on all four counts of the indictment.

The Court of Appeals for the Eleventh Circuit affirmed the judgment and on September 12, 2000 denied a petition for rehearing.

A. Proceedings Below

On January 23, 1996, a federal grand jury charged Petitioner Young and Petitioner Carruthers in a four-count indictment. In Count One petitioners were charged with knowingly receiving and distributing visual depict ions involving the use of minors engaging in sexually explicit conduct . . . from on or about December 24, 1992, and continuing through January 4, 1996, in violation of 18 U.S.C. § 2252(a)(2) and § 2; and knowingly to possess at least three books, magazines, periodicals, films, video, tapes, and other matter containing sexually explicit visual depiction that has been mailed, . . . in violation of 18 U.S.C. § 2252(a)(4)(B) and § 2. In Count Two, Petitioners were charged with knowingly and willfully taking and receiving into his possession a visual depiction, to wit, a cassette video tape depicting a person under the age of eighteen (18) engaged in sexually explicit conduct; this depiction of child pornography was mailed, . . . on or about January 4, 1996, in violation of 18 U.S.C. § 2252(a)(2) and § 2. In Count Three, petitioners were charged with knowingly possessing at least three photographs and pictures depicting persons under the age of eighteen (18) engaged in sexually explicit conduct, on or about January 4, 1996, in violation of 18 U.S.C. § 2252(a)(4)(B) and § 2. In Count Four, petitioners were charged with the Forfeiture Provision of 18 U.S.C. § 2253(a)(1) and § (3) (R1-1).

Petitioners entered a plea of not guilty on February 1, 1996. (R1-9).

On May 6, 1996, petitioners filed their Motion to Suppress Evidence, Motion to Suppress Statements and Motion to Dismiss. On January 14, 1997, Motion Hearings were held before the Honorable Duross Fitzpatrick. On January 16, 1997, the Court issued orders denying petitioners' Motion to Suppress Evidence, Motion to Suppress Statements and Motion to Dismiss. (R1-40; R1-43; R1-44; R1-58; R1-59).

On April 7, 1997, motion hearings, voir dire and the trial of the case began and continued until April 11, 1997, at which time a jury verdict was rendered and the petitioners were found guilty of Counts I, II, III, and IV of the indictment. (R1-79 - 1-86; R2-100 - 2-105).

On April 17, 1997, Petitioner Young filed for Judgment of Acquittal and Motion for New Trial. (R2-92). On July 10, 1997, Petitioner Young filed his first amended Motion for New Trial and Judgment of Acquittal. (R2-106). Petitioner Carruthers also joined in these motions. On December 31, 1997, the Court issued its Order denying petitioners Motions for Judgment of Acquittal and New Trial. (R2-110).

A Presentence investigative report was prepared by U.S. Probation Officer Ellen S. Moore on June 12, 1997. Ms. Moore also prepared a revised report on January 5, 1998, (R. Exhibit PSI) Petitioner Young filed objections to the presentence investigation report on July 10, 1997, (R2-107); amended objections on January 13, 1998, (R2-112); and a Sentencing Memorandum on January 14, 1998, (R2-113), petitioner Carruthers also filed similar objections.

On January 14, 1998, The Honorable Duross Fitzpatrick sentenced Petitioner Young to the custody of the U.S. Bureau of Prisons for 37 months with the recommendations that the Bureau of Prisons designate Petitioner Young to either Lexington, KY or Ft. Worth, TX BOP Medical Referral Centers. (R2-117). Petitioner Carruthers was sentenced to serve 42 months in custody followed by 3 years supervised release. It also provided for forfeiture of the property described in Count Four. (R2-118.)

On February 4, 1998, Appellant Young filed his Notice of Appeal. (R2-121).

Petitioners are currently free on appeal bonds and presently residing at their residence. Further, the forfeiture proceedings have been stayed. (R2-126)

On February 13, 1998, the Government filed its Notice of Appeal. (R2-128). On May 8, 1998, the USCA filed it's Order for an Entry of Dismissal, pursuant to the Government's Motion for Voluntary Dismissal. (R2-136).

On July 30, 1999, the Court of Appeals for the Eleventh Circuit issued a six page remand with instructions. (Appendix B)

On December 6, 1999, the District Court for the Middle District of Georgia held an evidentiary hearing and at the conclusion issued an oral decision finding that venireman Feagin did no meet the statutory literacy standard to qualify as a federal juror. (Appendix C).

On June 30, 2000, the Court of Appeals for the Eleventh Circuit issued a slip decision affirming the judgment. (Appendix A).

On July 21, 2000, petitioners filed a suggestion of rehearing (or hearing) en banc and petition for rehearing. On September 12, 2000, said petition was denied. (Appendix I).

On November 17, 2000, counsel for petitioner Young filed an entry of appearance on behalf of petitioner Carruthers.

REASONS FOR GRANTING THE WRIT

I.

LOCAL RULES 36.1 AND 36.2 COURT OF APPEALS FOR THE ELEVENTH CIRCUIT OPERATE TO DEPRIVE PETITIONERS OF THEIR CONSTITUTIONAL RIGHTS.

The Court of Appeals for the Eleventh Circuit remanded this case to the district court for a finding of fact concerning the qualifications of venireman Feagin and left open several other issues including the motion to suppress, the entrapment defense, the district court's evidentiary and sentencing ruling and the constitutionality of the criminal forfeiture.

The district court held an evidentiary hearing pursuant to the Court of Appeal's remand; and after hearing all the evidence, held that venireman Feagin did not meet the statutory literacy standard 28 U.S.C. § 1865(b) to qualify as a federal juror. The district court's decision was transferred back to the Court of Appeals to a second panel which consisted of two different justices. This second panel heard oral arguments on the juror issue alone, and then issued an unpublished one word slip decision "affirmed", and cited local rules 36.1 and 36.2.

The Petitioners contend that the Court of Appeals for the Eleventh Circuit should have issued findings of facts and conclusions of law based upon all of the outstanding issues and in particular on the issue of a new trial and the forfeiture which would have guided the district court on that issue which was still in abeyance.

Petitioners specifically show the court that the district court expressed reservations about the forfeiture of the residence of the petitioners and stated during the sentencing hearing that "maybe the forfeiture of the residence would be unduly harsh". R:2-133-47. Petitioners contend that by making that statement the district court was looking for guidance from the Eleventh Circuit as to whether or not it had the authority *not* to order the forfeiture of the house based upon the undue harshness of the sentence; and by issuing a "no decision" unpublished opinion, the Eleventh Circuit denied the Petitioners' rights under Article III of the Constitution of the United States and the due process clause of Amendment V of the United States Constitution.

Petitioners show that the Court of Appeals for the Eighth Circuit has just declared its own local rule forbidding the citation of unpublished opinions unconstitutional. *Anastasoff v. United States*, 99-3917 EM (August 22, 2000), 2000 US appeals Lexis 21179. The Court of Appeals for the Eighth Circuit reasoned that permitting it to avoid the precedential affect of its decisions the local rule violated Article III of the Constitution of the United States "because it purports to confer on the Federal Courts a power that goes beyond the judicial." *Id.* F3-4. Petitioner further contends that it is incumbent upon the circuit courts to treat every opinion as if it was a precedent and to issue findings of facts and conclusions of law in every case so that the district courts

and indeed the defendants and prosecutors in the cases can be guided in the future. As Circuit Judge Arnold so eloquently wrote in *Anastasoff* regarding the practicality of unpublished opinions. ". . . we may have decided this question the opposite way yesterday, but this does not bind us today, and what's more, you cannot even tell us what we did yesterday." Such a statement exceeds the judicial power, which is based on reason, but not fiat. *Id.* at 20-21.

The petitioners contend that the Eleventh Circuit's local rules 36.1 and 36.2 are in conflict with the Eight Circuit decision in *Anastasoff*; and therefore, the rules violate the petitioners' rights under the Constitution of the United States.

II.

THE DISTRICT COURT ERRED IN REFUSING TO DISQUALIFY A POTENTIAL JUROR WHO COULD NEITHER READ NOR WRITE THE ENGLISH LANGUAGE TO THE PROFICIENCY REQUIRED UNDER 28 U.S.C. §§ 1865(b)(2) & (4).

The petitioners contend that the first three judge panel who remanded this case on July 30, 1999, concluded that "If Feagin was illiterate by the statutory standard, therefore, the defendants would be entitled to a new trial". (Appendix B). After a full evidentiary hearing before the district court on December 6, 1999, the district court issued it oral order and findings, wherein the court stated "the court finds that Mr. Saul Feagin was not a proper juror in compliance with 28 USC §1865(b)." (Appendix C). Therefore as a matter of law, the petitioners contend that they are entitled to a new trial pursuant to the directives of the three judge panel which issued its ruling on July 30, 1999.

There was a different three judge panel that heard the oral argument in this case after the district court issued its finding of facts and conclusions of law. The petitioners contend that the second three judge panel ignored the dictates of the first panel in this matter. The Petitioners are aware of *United States v. Martinez-Salazar*, __ U.S. __ (2000) (2000 WL 33449) as it pertains to a juror issue where jurors are not excused for cause by the district court. Petitioners specifically contend that this case is factually distinguishable from that case and further that there is *no case on point* as it pertains to this particular issue.

Pursuant to local rules, prospective jurors have to fill out a juror qualification questionnaire. Question 4 of said questionnaire asks "Do you read, write, speak, and understand the English language? If another person filled out this form, please give your name and address on the other side of this form and explain the reason you gave assistance." At the evidentiary hearing before the district court, it was obvious to the presiding judge and all present that another individual had filled out the questionnaire and that venireman Feagin had merely signed it. The petitioners contend that venireman Feagin should never have been permitted to sit in the jury pool in the first place and therefore, the petitioners would not have had to use a strike to eliminate him from the jury. Venireman Feagin should have been eliminated from the pool as a matter of law, because he could neither read nor write the English language to the proficiency required under the statute.

Petitioners further show that there is a sentence on the jury qualification questionnaire that states; "I declare under penalty of perjury that all answers are true and correct to the best of my knowledge and belief" next to the signature line of the questionnaire. By failing to advise the clerk of the

court that he had assistance with filling out this form, venireman Feagin in essence committed perjury by not answering all the questions truthfully and correctly.

The petitioners specifically assert that the district court deliberately misapplied the law and this forced the petitioners to use a peremptory challenge to correct the court's error. The petitioners had requested additional juror strikes in this case, but was denied same by the district court.

III.

THE DISTRICT COURT ERRED IN DENYING PETITIONERS MOTIONS TO SUPPRESS EVIDENCE SEIZED IN VIOLATION OF THE FOURTH AND SIXTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

Petitioner contends that the items seized from his person and residence were seized pursuant to an illegal warrantless search which was conducted on January 4, 1996. The evidenced deduced at trial, which was undisputed, was that Petitioner Young asked for an attorney on at least four occasions while he was stopped on the side of the road by the Postal Inspectors (R1-64-121 - R1-64-122). It was further undisputed that the Postal Inspectors directed his every move by directing him where to sit and directing him to sign the Mirranda form and by seizing his portable telephone and placing it in the trunk of his automobile, thereby keeping him from being able to call his attorney.

At the motion to suppress hearing Petitioner Young testified that he felt that he was in custody at that point in time. (R1-64-123). The evidence at trial showed that when

the Postal Inspectors took Petitioner Young back to his home, he and Petitioner Carruthers were advised that if they did not give consent to search, then they both would have to get out of the house for 72 hours. (R1-64-125). Therefore the consent was obtained by coercion.

The Petitioners contend that this makes the resulting consent to search invalid because petitioner Young was denied on at least four occasions the opportunity to consult with an attorney before he signed the consent form. (R1-64-124). *Miranda v. Arizona*, 384 U.S. 436, 88 S. Ct. 1602, 16 L. Ed. 2d 694 (1966); *Cannady v. Dugger*, 931 F.2d 752 (11th Cir. 1991); *United States v. Lovar-Rico*, 61 F.3d 1529 (11th Cir. 1995). *See also Dickerson v. United States*, 530 U.S. __ (2000).

The fact is that Petitioner Young asked for a lawyer on at least eight occasions that evening, and all during this period of time the postal inspectors were continuing to interrogate both petitioners and were securing written evidence from Petitioner Young while continuing the search of the residence for a period of several hours. The petitioners' Fourth Amendment rights were violated by the illegal search, and their Sixth Amendment rights were violated because they were not allowed counsel during questioning after having requested counsel.

IV.

THE DISTRICT COURT ERRED IN ALLOWING DR. BARBARA BRUNER TO TESTIFY AS AN EXPERT WITNESS.

Dr. Bruner did not qualify as an expert under Rule 702 of the Federal Rules of evidence and under the guidelines set out in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 U.S. 2786 (1993). The Supreme Court held that Rule 702 of the Federal Rules of Evidence sets out a two tier test for admissibility of expert testimony. First the expert must show that he (she) is qualified by "knowledge, skill, experience, training or education", and second, the testimony must "assist the trier of fact to understand the evidence or determine a fact in issue." The expert opinion must be relevant and must meet a standard of "evidentiary reliability".

The petitioners objected to Dr. Bruner being qualified as an expert witness on the "Tanner Scale" due to the fact that she was not a Pediatric Endocrinologist and that she testified that she had merely read some of Tanner's work. Dr. Bruner testified that she had not read Tanner's original work and she was not sure what children were involved in Dr. Tanner's study. The evidence deduced at trial indicated that Dr. Bruner had viewed the "nephew" video tape in question in this case, and she had issued a written opinion that the male individual in the video was ten to eleven years old. It was determined at trial and on the morning of her testimony that the individual in the video was fourteen years old when the tape was made, therefore Dr. Bruner missed the age of the child by three and possibility four years. The Petitioners contend that Dr. Bruner's testimony was inherently unreliable and therefore should have been stricken from the record.

Dr. Bruner also testified that the individual in the photographs was 17 years old but also testified that the error factor for these photos also applied. Dr. Bruner did not qualify as an expert under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 U.S. 2786(1993). She should not have been allowed to testify; and furthermore, after she testified and she proved to be unreliable, the district court should have struck her testimony.

Petitioners contend that *Kumho Tire Co., LTD., et al. v. Carmichael et al.*, 526 U.S. 137 (1999) was decided after the reply brief and the Court of Appeals for the Eleventh Circuit did not make a determination on how *Kumho* should be applied to the facts and circumstances of this case.

V.

THE DISTRICT COURT ERRED IN NOT FINDING THAT THE PETITIONERS WERE ENTRAPPED AS A MATTER OF LAW.

A video tape of a fourteen year old nephew of Lonnie Northcutt was delivered after about three years of correspondence to the Petitioners by the Postal Authorities who had assumed Mr. Northcutt's identity. The petitioners never opened the tape, nor viewed the tape, as they were apprehended almost immediately upon retrieving the tape from the post office box where it was delivered. The petitioners contend that the evidence in this case established entrapment as a matter of law under *Jacobson v. United States*, 503 U.S. 540, 112 S. Ct. 1535, 118 L. Ed. 2d 174 (1992). In this case the postal agents of the government repeatedly over the course of three years urged the defendant to "request the delivery" of the one pornographic "nephew"

tape. The facts indicated that over that three year period of time the Petitioners and the government authorities exchanged legal adult tapes on numerous occasions but the petitioners never requested the tape of the 14 year old. The petitioners further rely on *United States v. Skarie*, 971 F.2d 317 (9th Cir. 1992). In *Skarie* the court determined that the defendant was entrapped as a matter of law and even though that defendant admitted to using drugs in the past this was not determinative of predisposition to use drugs in the future. The fact that the petitioners had exchanged legal adult tapes could not be determinative of predisposition in reference to home made tapes of minors.

VI.

THE DISTRICT COURT ERRED IN THE SENTENCING OF THE PETITIONERS IN VIOLATION OF THE EX POST FACTO LAW.

The upward departure of the sentencing was in violation of Article I par. 10 of the United States Constitution, the prescription against ex post facto laws.

The district court departed upward based upon the possession of multiple items that were seized in the search of the Petitioners residence. The sentencing guidelines were not enacted until 1987, which was five years after the seized photographs were taken. These photographs were dated and it was undisputed that they were developed in 1983, but were taken in 1982. Possession of those photographs only became a crime under the laws of the United States in 1990.

The district court expressed reservations about the sentencing of the petitioners because the petitioners' actions

in taking the pictures in 1982 were not violative of federal law. (Appendix F at 35a). The court further said that it was troubled by the possibility of a substantial increase in the sentence of the defendants based on their actions in 1982, which ran afoul of no federal law. (Appendix F at 36a). The court stated that the sentencing of the petitioners "raises distinct ex post facto concerns" (Appendix F at 34a). The court concluded that diligent research by counsel and an independent investigation by the court failed to locate a case precisely on point. (Appendix F at 37a). The court was persuaded by *United States v. Saucedo*, 950 F.2d 1508 (10th Cir.), *overruled on other grounds*, *Stinson v. United States*, 113 U.S. 1913, and stated while *Saucedo* is distinguishable from the case at bar and other circuits have disagreed with it's holding, the district court agreed with its rational, and there was no clear authority from the Eleventh Circuit in this matter. The district Court based its computations for sentencing on the base offense level of 15 at 2(g)2.2(a) and the five level increase at 2(g)2.2(b)4. Based upon the perceived ex post facto problem the district court expressed reservations about the forfeiture of the petitioners' house and subsequently stated "Well, I want, I would like to have the opportunity to revisit the question of the forfeiture of the house." (Appendix F at 41a), but then concluded that for the purpose of the sentence that he would go ahead and consider the property and the automobile forfeited. The fact remains that the district court was looking for guidance from the Eleventh Circuit concerning the ex post facto question on sentencing and forfeiture of the property.

Petitioners cite *Caremell v. Texas*, 530 U.S. __ (2000) in their argument concerning the ex post facto application of the guidelines to these items that were seized. The seized photographs were all located in a photo album and physically

attached to the pages. The Postal officials removed the photographs from the album and that was the only way they were able to create the illusion of possession of multiple items to sustain the upward departure.

VII.

THE FORFEITURE OF THE PETITIONERS' RESIDENCE AND OTHER PROPERTY WAS UNDULY HARSH AND IN VIOLATION OF THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The Petitioners contend that the forfeiture of the real property, including the residence of the petitioners located at 543 Thomaston Street, Barnesville, Georgia, 1994 Chrysler automobile, and cameras and equipment seized from the house was an excessive seizure and the penalty was disproportionate with the alleged acts of the petitioners.

Count IV of the Indictment was a forfeiture provision, but at the conclusion of the trial of the case the district court expressed reservations about the forfeiture of the residence and stated during the sentencing hearing "it concerns me that now that I have applied the cross reference, maybe the forfeiture of the residence would be unduly harsh." R2-133-47. The facts in this case show that Petitioner Young had gone to the United States Post Office to retrieve his mail, in the mail that day, and unbeknownst to him was the "nephew" tape sent to him by the postal authorities posing as Lonnie Northcutt. The postal authorities followed Petitioner Young to his house whereupon Petitioner Young went into the house and then immediately came right back out to carry some clothes to the laundry before it closed. It was at that point in

time that Petitioner Young was seized by the postal authorities and the subsequent search of the house revealed the package, still unopened, in the house.

The confiscated real estate does not have a close enough relationship to the offense and the fact that additional photographs were found in the residence does not indicate a substantial connection between the property and the charge. *Austin v. United States*, 113 U.S. 2801 (1993).

Petitioner Young also relies on *United States v. One Ford Ranger Truck*, 888 F. Supp. 1170 (1995), where by the Eleventh Circuit Court drew upon the Fourth Circuit's opinion in *United States v. Chandler*, 36 F.3d __ (4th Cir. 1994), specifically the Court considered the following factors: (1) whether the use of the property in the offense was deliberate and planned, or merely incidental or fortuitous; (2) whether the property was important to the success of the illegal activity; (3) the time in which the property was illegally issued and the special extent of its use; (4) whether its illegal use was an isolated incident or had been repeated; (5) whether the purpose of acquiring, maintaining, or using the property was to carry out the offense. Based upon this criteria the petitioners contend that the property subject to forfeiture did not meet any of the criteria set out in these cases. The automobile was only used to transport the nephew tape from the post office box to the residence, and it is undisputed that the petitioners did not and could not have known what was in the package at the time that it arrived. Petitioners also show that there was no nexus between the crime alleged and the house when all of the facts in the above named cases are considered.

Petitioners contend that the jury verdict by itself does not establish the Constitutionality of the forfeiture. The jury found only that the forfeiture was authorized under the broad terms of the forfeiture law. The jury was not given special instructions to determine whether the forfeiture was an excessive punishment. As previously noted the district court itself expressed reservations as to whether or not the forfeiture of the property was excessive and stated so during the sentencing phase of the trial. Petitioners respectfully contend that by making this statement, the district court judge was seeking guidance from the Eleventh Circuit. By issuing an unpublished, "no decision" ruling the Eleventh Circuit did not offer the district court any guidance for this and future cases. (*See* reason I).

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

J. MICHAEL CRANFORD
Attorney for Petitioners
P.O. Box 3324
Macon, Georgia 31205-3324
(478) 746-0704

APPENDIX

APPENDIX A — PER CURIAM ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED JUNE 30, 2000

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-8180

D. C. Docket No. 96-00002-CR-1-5

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LONNIE A. YOUNG,
STEPHEN A. CARRUTHERS,

Defendants-Appellants.

Appeals from the United States District Court
for the Middle District of Georgia

(June 30, 2000)

Before TJOFLAT, WILSON, and FLETCHER*, Circuit Judges.

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* Honorable Betty B. Fletcher, U. S. Circuit Judge for the Ninth Circuit, sitting by designation.

Appendix A

PER CURIAM:

AFFIRMED. *See* 11th Cir. R. 36-1.[1]

Entered: June 30, 2000
For the Court: Thomas K. Kahn, Clerk

By: s/ Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: SEP 25 2000

---

1. 11th Cir. R. 36-1 provides:

When the court determines that any of the following circumstances exist:

(a) judgment of the district court is based on findings of fact that are not clearly erroneous;

(b) the evidence in support of a jury verdict is sufficient;

(c) the order of an administrative agency is supported by substantial evidence on the record as a whole;

(d) summary judgment, directed verdict, or judgment on the pleadings is supported by the record;

(e) judgment has been entered without a reversible error of law; and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

APPENDIX B — PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED JULY 30, 1999

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-8180

D. C. Docket No. 5:96-CR-2-001-WDO

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LONNIE A. YOUNG,
STEPHEN A. CARRUTHERS,

Defendants-Appellants.

Appeals from the United States District Court
for the Middle District of Georgia

(July 30, 1999)

Before TJOFLAT, COX and HULL, Circuit Judges.

PER CURIAM:

Lonnie A. Young and Stephen Carruthers appeal their convictions and sentences for receipt and possession of child pornography, in violation of 18 U.S.C. § 2252, conspiracy to commit the same, and criminal forfeiture under 18 U.S.C. § 2253. We order a limited remand for fact-finding.

Appendix B

I. Background

Before jury selection, the veniremen completed a supplemental questionnaire aimed at detecting biases unique to this kind of case. Venireman Saul Feagin's responses to the supplemental questionnaire and questions during voir dire cast grave doubt on Feagin's literacy. The supplemental questionnaire consisted mostly of a series of yes-no questions followed by blanks that elicited details if the answer to the yes-no question was "yes." Thus, for example, the questionnaire asked among other things if the venireperson worked for the Department of Family & Children Services, had been a victim of sexual abuse, had been accused of sexual abuse, had consumed pornography, or "disagreed with an individual's right to view . . . sexually explicit photographs." (Sealed Exhibit 90, Supplemental Juror Information Questionnaire, Juror 55.) If the venireperson worked for the Department of Family & Children Services, or had experienced or been accused of sexual abuse, the questionnaire asked for explanation. Feagin marked every single question "yes" — including those that seemed internally inconsistent — but otherwise left the questionnaire totally blank, except for his name at the top of the page and his signature. Feagin did not answer at all the questions that were not yes-no, such as an inquiry into his religious affiliation and his personal definition of "pornography." In voir dire, Feagin (a church janitor) testified that many of his answers were inaccurate and finally admitted that he "couldn't read it all." (R.5 at 8.) He further testified that he had incorrectly answered a "questionnaire that [he] wrote and sent in originally, back before [he] came to jury duty," apparently a different questionnaire from the one just described. (R.5 at 10.)

Appendix B

Based on their questioning and the jury questionnaire or questionnaires, the defendants asked the court to strike Feagin for cause because of his illiteracy. The court made no finding on Feagin's literacy. Rather, the court denied the defendants' request to strike Feagin for cause as a matter of law, reasoning that "the ability to read and write is not a requirement to serve as a juror." (R.5 at 12.) As a result, the defendants were forced to use a peremptory strike to remove Feagin from the panel. (*See* R.10 at 140.)

Young and Carruthers challenge the district court's failure to strike Feagin for cause. Our review is for abuse of discretion. *See United States v. Rouco*, 765 F.2d 983, 989 (11th Cir. 1985). (We reject without discussion Young and Carruthers's challenges to the sufficiency of the evidence to support their convictions, as well as their constitutional challenges to 18 U.S.C. § 2252. *See* 11th Cir. R. 36-1. Because of our disposition of the appeal, we do not now address the defendants' arguments concerning their motion to suppress, their entrapment defense, the court's evidentiary and sentencing rulings, and the constitutionality of the criminal forfeiture.)

II. Discussion

The defendants' argument is potentially meritorious, but we cannot fully resolve it here for want of fact-finding. To qualify for jury service, jurors must be able to "read, write, and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form." 28 U.S.C. § 1865(b)(2); *see Rouco*, 765 F.2d at 988 n.3. Under the statute's plain language, therefore,

if Feagin was so illiterate that he could not complete a juror qualification form, he was not qualified to serve and should have been struck for cause. *Cf. United States v. González-Soberal*, 109 F.3d 64, 69 (1st Cir. 1997) (acknowledging that lack of English competency requires dismissal for cause, although in that case the juror was sufficiently fluent). The district court's refusal to do so would amount to a mistake of law, and "[a] district court by definition abuses its discretion when it makes an error of law." *Koon v. United States*, 518 U.S. 81, 100, 116 S. Ct. 2035, 2047 (1996).

If the court erred in failing to strike Feagin for cause, that error forced the defendants to "waste" a peremptory strike guaranteed by rule, *see* Fed. R. Crim. P. 24(b), and reversal would be required without any inquiry into prejudice. *See Swain v. Alabama*, 380 U.S. 202, 219, 85 S. Ct. 824, 835 (1965), *overruled on other grounds*, *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712 (1986); *United States v. Nell*, 526 F.2d 1223, 1230 (5th Cir. 1976) (reversing and remanding for new trial, without harmless error analysis, a case in which the district court erred in failing to excuse two jurors for cause); *see also Kirk v. Raymark Indus.*, 61 F.3d 147, 159 (3d Cir. 1995) (holding that *Swain*'s per se-prejudice rule has survived *Batson* and *Ross v. Oklahoma*, 487 U.S. 81, 108 S. Ct. 2273 (1988)[1]); *United States v.*

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1. *Ross* held that a *state* court's refusal to excuse a juror for cause, thus forcing use of a peremptory strike, does not warrant relief under 28 U.S.C. § 2254 absent a showing that the jury actually empaneled was biased, as long as the defendant received the peremptory challenges allowed by state law. *See Ross*, 487 U.S. 81, 91, 108 S. Ct. 2273, 2279 (1988). *Ross* did not answer, and indeed

(Cont'd)

Cambara, 902 F.2d 144, 147 (1st Cir. 1990) ("[R]estricting a defendant's use of the lawful number of peremptory challenges is reversible error if a challenge for cause is erroneously denied . . . ."); *United States v. Ruuska*, 883 F.2d 262, 268 (3d Cir. 1989) (accord); *United States v. Moseley*, 810 F.2d 93, 96 (6th Cir. 1987) ("[A]ny system which denies or impairs the accused's right to exercise peremptories is reversible error without a showing of prejudice."); *Carr v. Watts*, 597 F.2d 830, 833 (2d Cir. 1979) (similar to *Cambara*); *United States v. Rucker*, 557 F.2d 1046, 1049 (4th Cir. 1977) (similar to *Cambara*). If Feagin was illiterate by the statutory standard, therefore, the defendants would be entitled to a new trial.

The record here suggests that Feagin would not have been able to read the juror qualification form unaided, and thus would not have been qualified to sit. But we are not sure from the record what material was before the district court, and because of the district court's interpretation of the law, we have no finding either way about Feagin's literacy. Rather than reverse, therefore, we direct a limited remand for a finding of fact from the district court on this issue.

(Cont'd)
explicitly reserved, the question of whether error must be shown for relief when a failure to excuse for cause deprives a defendant of rightful peremptory strikes. *See id.* at 91 n.4, 108 S. Ct. at 2280 n.4. For that reason, we agree with the Third Circuit that *Ross* did not overrule *Swain* or circuit-level precedent holding such error to be per se reversible. (The panel decision in *United States v. Farmer*, 923 F.2d 1557, 1566 (11th Cir. 1991), which follows *Ross* and is arguably at odds with our holding here, is distinguishable, and failed to discuss binding precedent.)

Appendix B

III. Conclusion

For the foregoing reasons, we remand this case for the limited purpose of allowing the district court to make a finding whether venireman Feagin met the statutory literacy standard to qualify as a federal juror.

REMANDED WITH INSTRUCTIONS.

APPENDIX C — EXCERPTS FROM EVIDENTIARY HEARING OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA, MACON DIVISION DATED DECEMBER 6, 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

5:96-CR-02 (DF)

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LONNIE A. YOUNG AND,
STEPHEN A. CARRUTHERS,

Defendants.

TRANSCRIPT OF PROCEEDINGS

DECEMBER 6, 1999

* * *

[22] . . . these, that we put on there that you are not supposed, that it is supposed to be done by you. I don't know. I mean, it is something that we need to — I think it does, somewhere, say if anybody helps you, tell them to write on the other side who they were. But they didn't do it.

Of course, I guess if — Well, that is that and this is this.

All right. The court finds that Mr. Saul Feagin was not a proper juror in compliance with 28 United States Code, Section 1865(b).

I don't think there is anything else I can do. And it will, I guess, go back now to the Eleventh Circuit, and we'll see what they say.

All right. We are adjourned.

(End of proceedings)

* * * *

APPENDIX D — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA RE *UNITED STATES OF AMERICA v. LONNIE ANDREW YOUNG* DATED AND FILED JANUARY 26, 1998

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF GEORGIA

Case Number: 5:96CR00002-001

UNITED STATES OF AMERICA

v.

LONNIE ANDREW YOUNG

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Michael Cranford
Defendant's Attorney

THE DEFENDANT:

* * *

☒ was found guilty on count(s) 1, 2, 3 & 4 after a plea of not guilty.

Appendix D

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 U.S.C. § 2252 (a)(2)	& 18:2252(a)(4)(B) Consp. to receive child pornography & consp. to possess child pornography	01/04/1996	1
18 U.S.C. § 2252 (a)(2)	Receiving material involving the sexual exploitation of a minor	01/04/1996	2
18 U.S.C. § 2252 (a)(4)(B)	Possession of materials of minors engaged in sexually explicit conduct	01/04/1996	3
18 U.S.C. § 2253(a)	Criminal forfeiture	01/04/1996	4

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

* * *

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing

address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 414-52-6991	01/14/1998 Date of Imposition of Judgment
Defendant's Date of Birth: 07/24/1937	
Defendant's USM No.: 86513-020	s/ Duross Fitzpatrick Signature of Judicial Officer
Defendant's Residence Address: 543 Thomaston Street Barnesville GA 30204	Duross Fitzpatrick, Chief Judge U.S. District Court Name & Title of Judicial Officer
Defendant's Mailing Address: 543 Thomaston Street Barnesville GA 30204	January 26, 1998 Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 37 month(s).

37 months, Ct. 1, 37 months, Ct. 2 and 37 months, Ct. 3 for a total imprisonment of 37 months

Appendix D

☒ The court makes the following recommendations to the Bureau of Prisons:

Court recommends BOP designate to either Lexington, KY or Ft. Worth, TX BOP Medical Referral Centers

* * *

☒ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

* * *

☒ as notified by the Probation or Pretrial Services Office.

* * *

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 year(s).

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

Appendix D

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

* * *

☒ The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page (if indicated below).

See Special Conditions of Supervision — Sheet 3.01

Appendix D

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate

with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

You shall participate in a mental health treatment program for sexual offenders while in custody and at the direction of the Probation Office upon your release.

Appendix D

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment
Totals:	$ 150.00

* * *

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A ☒ in full immediately;

* * *

The National Fine Center will credit the defendant for all payments previously made toward any criminal monetary penalties imposed.

* * *

Appendix D

☒ The defendant shall forfeit the defendant's interest in the following property to the United States:

All interests in the property to include at 1994 Chrysler LeBaron, the residence located at 543 Thomaston St. in Barnesville, GA, as well as the additional items referenced in the preliminary order of forfeiture.

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments are to be made to the United States Courts National Fine Center, Administrative Office of the United States Courts, Washington, DC 20544, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program. If the National Fine Center is not operating in this district, all criminal monetary penalty payments are to be made as directed by the court, the probation officer, or the United States attorney.

STATEMENT OF REASONS

* * *

☒ The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

(See Attachment)

See Additional Factual Findings and Guideline Application Exceptions — Sheet 6.01

Appendix D

ADDITIONAL FACTUAL FINDINGS AND GUIDELINE APPLICATION EXCEPTIONS

Paragraph 10 — The first two sentences of this paragraph are to be deleted.

Paragraph 14 — The word "tape" should be plural so that the sentence in this paragraph would be correctly stated as: We would enjoy your tapes.

Paragraph 23 — The correct age of Freeman Northcutt is 14 years old.

Paragraphs 37 and 52 — The Court ruled that the cross references at both USSG 2G2.2(c)(1) and USSG 2G2.4(c)(1) would not apply.

Paragraphs 39 and 54 — The Court ruled that the two level increase at USSG 2G2.1(b)(1) would not apply.

Paragraphs 59 through 66 — The Court having ruled that the cross referenced at both USSG 2G2.2(c)(1) and 2G2.4(c)(1) was not applicable, the Court noted that the application of USSG 2G2.1(c)(1) was not relative.

Appendix D

Guideline Range Determined by the Court:

Total Offense Level: 20

Criminal History Category: I

Imprisonment Range: 33 to 41 months.

Supervised Release Range: 2 to 3 years.

Fine Range: $ 7,500.00 to $ 75,000.00

☒ Fine waived or below the guideline range because of inability to pay.

* * *

☒ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by the application of the guidelines.

* * * *

APPENDIX E — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA RE *UNITED STATES OF AMERICA v. STEPHEN A. CARRUTHERS* DATED AND FILED JANUARY 26, 1998

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF GEORGIA

Case Number: 5:96CR00002-002

UNITED STATES OF AMERICA

v.

STEPHEN A. CARRUTHERS

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Charles T. Erion
- Defendant's Attorney

THE DEFENDANT:

* * *

☒ was found guilty on count(s) 1, 2, 3 & 4 after a plea of not guilty.

Appendix E

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 U.S.C. § 2252 (a)(2)	& 18:2252(a)(4)(B) Consp. to receive child pornography & consp. to possess child pornography	01/04/1996	1
18 U.S.C. § 2252 (a)(2)	Receiving material involving the sexual exploitation of a minor	01/04/1996	2
18 U.S.C. § 2252 (a)(4)(B)	Possession of materials of minors engaged in sexually explicit conduct	01/04/1996	3
18 U.S.C. § 2253(a)	Criminal Forfeiture	01/04/1996	4

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

* * *

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing

address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 401-66-7304	01/14/1998 Date of Imposition of Judgment
Defendant's Date of Birth: 04/30/1949	
Defendant's USM No.: 86514-020	s/ Duross Fitzpatrick Signature of Judicial Officer
Defendant's Residence Address: 543 Thomaston Street Barnesville GA 30204	Duross Fitzpatrick, Chief Judge U.S. District Court Name & Title of Judicial Officer
Defendant's Mailing Address: 543 Thomaston Street Barnesville GA 30204	January 26, 1998 Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 42 month(s).

42 months, Ct. 1, 42 months, Ct. 2 and 42 months, Ct. 3 for a total imprisonment of 42 months

Appendix E

☒ The court makes the following recommendations to the Bureau of Prisons:

Court recommends to Bureau of Prisons that the defendant be designated to the BOP Medical Referral Center at Rochester, Minnesota.

* * *

☒ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

* * *

☒ as notified by the Probation or Pretrial Services Office.

* * *

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 year(s).

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

Appendix E

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

* * *

☒ The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page (if indicated below).

See Special Conditions of Supervision — Sheet 3.01

Appendix E

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate

with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

Defendant shall participate in a mental health treatment program for sexual offenders while in custody and at the direction of the Probation Office upon your release.

Appendix E

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment
Totals:	$ 150.00

* * *

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A ☒ in full immediately;

* * *

The National Fine Center will credit the defendant for all payments previously made toward any criminal monetary penalties imposed.

* * *

Appendix E

☒ The defendant shall forfeit the defendant's interest in the following property to the United States:

All interests in the property to include a 1994 Chrysler LeBaron, the residence located at 543 Thomaston St. in Barnesville, GA, as well as the additional items referenced in the preliminary order of forfeiture.

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments are to be made to the United States Courts National Fine Center, Administrative Office of the United States Courts, Washington, DC 20544, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program. If the National Fine Center is not operating in this district, all criminal monetary penalty payments are to be made as directed by the court, the probation officer, or the United States attorney.

STATEMENT OF REASONS

* * *

☒ The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

(See Attachment)

See Additional Factual Findings and Guideline Application Exceptions — Sheet 6.01

Appendix E

ADDITIONAL FACTUAL FINDINGS AND GUIDELINE APPLICATION EXCEPTIONS

Paragraph 10 — The first two sentences of this paragraph are to be deleted.

Paragraph 14 — The word "tape" should be plural so that the sentence in this paragraph would be correctly stated as: We would enjoy your tapes.

Paragraph 23 — The correct age of Freeman Northcutt is 14 years old.

Paragraphs 37 and 52 — The Court ruled that the cross references at both USSG 2G2.2(c)(1) and USSG 2G2.4(c)(1) would not apply.

Paragraphs 39 and 54 — The Court ruled that the 2 level increase at USSG 2G2.1(b)(1) would not apply.

Paragraphs 59 through 66 — The Court having ruled that the cross reference at both USSG 2G2.2(c)(1) and 2G2.4(c)(1) was not applicable, the Court noted that the application of USSG 2G2.1(c)(1) was not relative.

Appendix E

Guideline Range Determined by the Court:

Total Offense Level: 20

Criminal History Category: II

Imprisonment Range: 37 to 46 months.

Supervised Release Range: 2 to 3 years.

Fine Range: $ 7,500.00 to $ 75,000.00

☒ Fine waived or below the guideline range because of inability to pay.

* * *

☒ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by the application of the guidelines.

* * * *

APPENDIX F — EXCERPTS FROM SENTENCING HEARING OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA, MACON DIVISION DATED JANUARY 14, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

5:96-CR-2-01/02 (DF)
JANUARY 14, 1998
MACON, GEORGIA
BEFORE THE HONORABLE DUROSS FITZPATRICK

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LONNIE A. YOUNG AND,
STEPHEN A. CARRUTHERS,

Defendants.

SENTENCING PROCEEDINGS

* * *

[23] . . . have been a problem in 1994. It may still be a problem now. I would assume that in four years it has been addressed.

But obviously, prisoners are being sent to the various correctional institutions around the country daily. And I am

going to conclude the debate over whether or not the Bureau of Prisons can provide adequate health care for the defendants by ruling they can.

And I do have to make the observation that both of these men live in Barnesville, Georgia, a little town of four or five thousand people. They don't live across the street from the Emory Hospital or the Georgia Baptist or any other hospital, so that they could get this instantaneous treatment in case something went wrong.

I am sure Dr. Tanner is a skilled physician, but he is a family practitioner. He is not a specialist himself. So I don't see how they would be losing something going into the prison system, that they would already have.

Now, we are back, and I have decided that I will not make a downward departure on the question of their health care, their fragile health.

That leaves us with the other issue, which is the ex post facto operation of the law concerning the taking of the pictures and the possession of the pictures. And I am prepared to rule on that.

I have reduced it to writing, so I can say everything [24] that needs to he said without fear of leaving anything out.

It is undisputed that the defendants took the pictures involved in this case in 1982, and the date that the defendants created the videotape of themselves with an unidentified male is not known.

Appendix F

Both the creation and possession of child pornography were prohibited by federal statutes passed some time after 1982. Citing the US V D'ANGELO. It makes it clear that possession is a continuing offense and the court is convinced that the defendants, Young and Carruthers, must be sentenced under United States Sentencing Guidelines Section 2(g)2.4.

At issue here is the application of the cross-reference described in United States Sentencing Guidelines 2(g)2.4(c)1. Defendants argue that such an application of the guidelines violates the ex post facto clause. The government argues this cross-reference is invoked because the defendants caused a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct. Such a conclusion troubles the court, however, because the defendants' actions in taking these pictures in 1982 were not violative of federal law.

The government supports its position with the Fifth Circuit case, US V LAYNE, 43 F.3d 127 that found no violation of the ex post facto clause where a felon found to be in possession of a firearm argues that the firearm had crossed state lines [25] before the effective date of the federal statute. Although proving that the firearm traveled in interstate commerce is a necessary element of the offense, the Fifth Circuit held that the continuing nature of the possession incorporated acts that occurred prior to statutory prohibition.

Similarly, the government has cited cases that hold overt acts of a conspiracy may occur before a change in the guidelines and still support a sentence based on the amended guidelines.

Appendix F

These cases differ from the one at bar in that involvement in interstate commerce and overt acts are required elements of the possession and conspiracy charges described above.

In contrast, the creation of these pictures is entirely separate from possession of them. The court is troubled by the possibility of a substantial increase in the sentence of these defendants based on their actions in 1982, which ran afoul of no federal law.

In response to this concern the government has directed the court to an unpublished Tenth Circuit case, US V RAY, in which the court sentencing a defendant for possession of child pornography with intent to sell the videos departed upward from the applicable guideline range.

Because the video included the rape of a child, the defendant in RAY contested this departure by arguing the statute [26] of limitations for RAY had passed and he could no longer be prosecuted for this crime.

The Tenth Circuit disagreed with the defendant holding that a sentencing judge could consider any relevant conduct regardless of whether defendant could presently be prosecuted for such criminal conduct.

Indeed, even conduct for which a defendant has been acquitted, can be considered in the enhancement of a sentence. However, these cases involve conduct that was illegal at the time the defendant engaged in them.

The sentencing of Young and Carruthers raises distinct ex post facto concerns. For a law to be ex post facto it must

meet the following requirements: First, the law must be retrospective. That is, it must apply to events occurring before its enactment. And second it must disadvantage the defendant affected by it.

Diligent research by counsel and an independent investigation by the court have failed to locate a case precisely on point. The court is persuaded by US V SAUCEDO, 950 F.2d 1508, Tenth Circuit case, overruled on other grounds, STINSON V UNITED STATES, 113 Supreme Court 1913. In SAUCEDO a defendant was sentenced after a change in the guidelines altered the scope of relevant conduct that could be considered by their sentencing court. The offense and relevant acts which could have been used to increase the length of the defendant's . . . .

* * *

[45] This computation is based on the base offense level of 15 at 2(g)2.2(a) and the five-level increase at 2(g)2.2(b)4.

It is noted that the guideline fine range is also affected by this ruling and now becomes 7500 to 75,000 dollars.

As to Count 1, the court commits you to the Bureau of Prisons for a period of 37 months. On Count 2 the court commits you to the Bureau of Prisons for a period of 37 months. And as to Count 3 the court commits you to the Bureau of Prisons for a period of 37 months. Each count is to run concurrently for a total sentence of imprisonment of 37 months.

Appendix F

The court further orders you to immediately pay a — No, I'm going to waive the fine.

A term of three years supervised release is imposed with respect to each count of conviction to run concurrently for a total term of supervised release of three years. Supervised release commences upon your release from the Bureau of Prisons and includes the standard and mandatory conditions of supervised release and the following special conditions:

You are prohibited from possessing a firearm or other dangerous weapon. You shall participate in a mental health treatment program for sexual offenders while in custody and at the direction of the probation office upon your release.

As to Count 4, you are to forfeit all interest in the properties to include a 1994 Chrysler Lebaron, the residence located a 507 Thomaston Street in Barnesville, Georgia as well . . . .

* * *

[47] . . . have been made and sentence imposed, are there any objections to the sentence as to the findings of fact and conclusions of law other than those already stated for the record?

MR. CRANFORD: None other than the ones that we have already stated, your Honor. We would ask your Honor for a voluntary surrender. I have already spoken to the U.S. Attorney's Office and they said they have no objections.

THE COURT: I will agree to voluntary surrender. Now. I don't believe — if you will have a seat I want to —

MR. CRANFORD: Yes, sir, your Honor.

THE COURT: I want to address this issue of the residence.

MR. CRANFORD: Yes, sir.

THE COURT: Ms. Ratley, it concerns me that now that I have applied the cross-reference, maybe the forfeiture of the residence would be unduly harsh.

MS. RATLEY: Judge, I believe that the count which includes the forfeiture count found, where the jury found them guilty, includes both possession count and the receiving count. And the count, the indictment reads that it should be forfeited. Any property, real or personal, used or intended to be used in any manner or part to commit and promote the commission of the offense.

If you look at the code, it includes the possession count. The possession count and the receiving count. These [48] items were certainly possessed in that home. That was a repository for those items over the total period of time, and the jury found these individuals guilty of possession and receiving. And as a result found that these items, including this home, was used, were intended, used or intended to be used in the commission of those offenses.

THE COURT: All right, Mr. Cranford, anything you want to say?

MR. CRANFORD: Well, your Honor, I certainly would like the opportunity to, in light of your decision, to submit something to the court in the future. I think this definitely pertains to the ex post facto situation, because particularly the items that were seized from the house are the videos, I mean excuse me, are the photographs that were taken prior to it being an illegal activity. And —

THE COURT: Okay. Let me think here. Mr. Erion, I mean, the same applies to your client.

MR. ERION: Yes, sir.

THE COURT: Any observations about this?

MR. ERION: My primary observation is the same as Mr. Cranford's. It is not something that I am prepared to argue comfortably today. Not that I'm uncomfortable with the argument. But I'm uncomfortable not having any authority to give your Honor one way or the other.

THE COURT: Well, it is, this whole procedure, the [49] jury verdict dealing with the forfeiture is new. This is the first one I have had to deal with. I am inclined to say that I will reserve ruling on the forfeiture of the house until we can have another hearing or I can receive a brief on that.

Ms. Ratley —

MS. RATLEY: Judge, I think from a procedural point of view, without the court giving up control over this, I believe the proper way would be for the defendants to file

a motion for new trial based on the court's ruling of the sentencing. I think from a procedural point of view we need the court to go ahead and impose that sentence at this time, but it could be —

THE COURT: Well, I want, I would like to have the opportunity to revisit the question of the forfeiture of the house.

MS. RATLEY: I understand. And I think, I would certainly agree for the court to revisit it. But I think to protect the record we need for you to impose the sentence at this time.

THE COURT: I think we need to get this over with, too. I am going to agree with your suggestion on that.

So for the purpose of this sentence, I do find that the residence located at 543 Thomaston Street in Barnesville, Georgia, as well as the 1994 Chrysler Lebaron are both forfeited.

I do, also, based an our conversations with Dr. Kindig . . . .

* * * *

APPENDIX G — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA, MACON DIVISION DENYING MOTION FOR NEW TRIAL DATED AND FILED DECEMBER 30, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

5:96-CR-2 (DF)

UNITED STATES OF AMERICA,

VS.

LONNIE ANDREW YOUNG and
STEPHEN A. CARRUTHERS,

Defendants.

ORDER

The Court presided over the jury trial of this criminal matter from April 4, through April 11, 1997. Prior to the trial the Court held a hearing and ruled on a motion to suppress evidence discovered during a search of Defendants' home and a motion to dismiss the indictment. Defendants' motions for acquittal and, in the alternative, new trial are pending before the Court.[1]

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1. Shortly after the trial, Defendant Young filed a Motion for a Judgment of Acquittal (Tab # 92), and Defendant Carruthers filed (Cont'd)

Appendix G

The Indictment consists of four counts. Count One charges Defendants with conspiring to receive child pornography through the mail and to knowingly possess more than three items containing visual depictions of child pornography. Count Two charges Defendants with knowingly and willfully receiving a videotape containing child pornography through the mail. Count Three charges Defendants with knowingly possessing at least three photographs and pictures depicting child pornography, which have some nexus to interstate commerce. Count Four seeks the forfeiture of Defendants' property used in committing the crimes described above.

Defendants attack their convictions on several grounds, which are discussed below. After careful consideration of each of the issues raised by Defendants, the Court concludes that Defendants' motions must be denied.

I. Illegal Search

In their post-trial motions, Defendants again challenge the legality of the search of their home. The Court has dealt with this issue in a detailed Order of January 16, 1997, and will not elaborate on the rationale again here.

(Cont'd)
a Motion for Judgment of Acquittal (Tab # 94) in which he joins in most of the contentions raised by his codefendant. The Court allowed the Defendants to supplement their motions after the completion of the trial transcript. Subsequently, Defendant Young submitted his First Amended Motion for Judgment of Acquittal and Motion for New Trial (Tab # 106).

Appendix G

II. Judgment of Acquittal Based on Insufficient Evidence

A judgment of acquittal may be granted only if the evidence is insufficient to support the verdict. *See* ***United States v. Varkonyi***, 611 F.2d 84, 86 (5th Cir. 1980). In considering Defendants' motions, this Court must determine whether, "viewing all the evidence in the light most favorable to the government and drawing all reasonable inferences and credibility choices in favor of the jury's verdict, a reasonable trier of fact could find that the evidence established guilt beyond a reasonable doubt." ***United States v. O'Keefe***, 825 F.2d 314, 319 (11th Cir. 1987). Furthermore, "it is not necessary that the evidence exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt. A jury is free to choose among reasonable constructions of the evidence." ***United States v. Bell***, 678 F.2d 547, 549 (5th Cir. 1982) (en banc), *aff'd.* 462 U.S. 356, 103 S.Ct. 2398 (1983).

In their motions for acquittal, Defendants raise several arguments dealing with the insufficiency of the evidence. These arguments are best understood when analyzed under the relevant count of the indictment.

A. Count One

Count one charges Defendants with conspiring to receive child pornography through the mail and to knowingly possess more than three items containing visual depictions of child pornography. In their motions, Defendants do not specifically attack the conviction on the conspiracy count, but, rather, focus on the evidence supporting the substantive counts. The

Court must note, however, that sufficient evidence was presented at trial to support a conviction on Count One for both defendants.

The establishment of a conspiracy is particularly important in analyzing the charges in counts two and three against Carruthers. Defendant Carruthers has filed a motion for judgment of acquittal in which he argues that there is no evidence in the record from which the jury could conclude that he knew the content of Young's letters or conversations. However, the substantive crimes committed by a member of a conspiracy are attributable to other co-conspirators if the crimes are "reasonably foreseeable as a necessary or natural consequence of the unlawful agreement." ***United States v. Gualdado***, 794 F.2d 1533, 1535 (11th Cir. 1986).

The presence of Carruthers in a videotape and photographs with people who the government demonstrated to be less than eighteen years of age, is sufficient to support his conviction on the conspiracy count, and to attribute Young's actions to him in support of a conviction on Count Two. (*See* T.2 at 82 (pictures), & T.4 at 20-21 (videotape)) Given Carruthers' involvement in these activities, Young's statements and correspondence attempting to secure similar types of child pornography were reasonably foreseeable actions in furtherance of the conspiracy. Therefore, the acts of Defendant Young are attributable to Defendant Carruthers.

B. Count Two

Count two charges Defendants with knowingly and willfully receiving a videotape containing child pornography through the mail. Defendants argue that they were entrapped

by Postal Inspector Rushwin. After reviewing the evidence in this case, the Court cannot conclude that Defendants were entrapped as a matter of law. The Court instructed the jury on the law of entrapment and they made the factual determination that there was no entrapment in this case. The Court will not disturb this finding.

C. Count Three

Count Three charges Defendants with knowingly possessing at least three photographs and pictures depicting child pornography, which have some nexus in interstate commerce. Federal law defines a child as a person less than eighteen years of age. 18 U.S.C. § 2256 (1). Defendant Young attacks the six photographs, which were admitted into evidence, on the basis that it was not conclusively established that the persons depicted were less that eighteen years of age. Defendants make the same argument about the pictures contained in the magazine, Licorice Stick.

At trial, the government's expert testified that she believed that the young men depicted in the photographs and magazine were within the Tanner IV stage of development. (T.3 at 20-26) Defendant Young argues that this was insufficient to support a conviction because the government's expert testified that an eighteen year old could exhibit Tanner IV characteristics and that it was possible, although not probable, that the people in the photographs were over eighteen. The fact that the government's expert could not determine the age of someone in a photograph with certainty was before the jury. Her uncertainty was clearly elicited during cross-examination. However, the testimony of the

witness was not the only evidence before the jury. The pictures themselves were admitted into evidence and the jury concluded that the people depicted were minors. Furthermore, the jury made this determination beyond a reasonable doubt. The Court cannot find that this conclusion is incorrect as a matter of law.

D. Videotape II[2]

Defendant Young next objects to the following stipulation, which was read to the jury:

> [A] tape seized from Terry Morrow's home on April 6, 1995, contains the following:
>
> A segment in the video showed that the two defendants did engage in homosexual sex with a third male. These acts include oral sex, anal sex and masturbation between all three males at the same time. The third male, who cannot be identified because a frontal view is never shown, appears to be younger than the defendants. The sexual acts took place in a bedroom of the defendants' home in Barnesville, Georgia. While Defendant Young was out of the video and these acts were taking place, camera flashes were observed.

(T. 4 at 20-21)

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2. This is not the videotape that is the basis of count two of the indictment. This videotape was discovered during the search of Terry Morrow's home in Tennessee, and depicts the defendants with an unidentified male.

Appendix G

In his brief Defendant Young argues: "there was absolutely no evidence offered to prove that the individual was indeed under the age of eighteen . . ."[3] This is simply not true. The government called a witness in whose possession the videotape was discovered, Terry Morrow, and he testified that Defendant Lonnie Young told him that the unknown individual in the picture was sixteen years of age. (T.4 at 18). The Defendants strongly question the veracity of this witness, but his plea agreement and potential sentence was presented to the jury. Defendant's complaint is in essence, an argument that the jury should have found that this witness was not credible. The jury had knowledge of all of the information necessary to make this determination, and choose to believe Terry Morrow. The Court will not disturb this conclusion.

III. Juror Qualifications

Defendants argue that the Court erred in refusing to disqualify a potential juror. During the voir dire process it became apparent that a member of the jury panel had difficulty reading a supplemental questionnaire, (hereinafter this potential juror will be referred to as "SF"). Both parties suggested that SF may not be qualified, but the Court refused to remove him based on his inability to read. In response to the objections, the Court stated: "The ability to read and write is not a requirement to serve as a juror . . . [I]f you could show me something in statutory law that says it is a

---

3. This videotape was not necessary for a conviction on any of the counts of the indictment, but it was considered by the jury in reaching their verdict and, therefore, should be addressed here.

requirement, then I will take a look at it, but I don't believe that the ability to read and write is a requirement."[4]

Defendants used one of their preemptive strikes to remove SF from the jury panel. They contend that it was error not to strike this juror for cause and Defendants were prejudiced by having to strike SF. Defendants argue that the Court's ruling violated the Jury Selection and Service Act, 28 U.S.C. § 1861-1878 (as amended).

28 U.S.C. § 1865(b)(2) states that a person will not be qualified to serve on a grand or petit jury in a district court if he or she is "unable to read, write, and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form." SF satisfactorily completed the initial juror qualification questionnaire, and responded in the affirmative to the question, "Do you read, write, speak, and understand the English language?" The questionnaire continues, "if another person filled out this form, please give your name and address on the other side of form and explain the reason you gave assistance." The back of SF's questionnaire is blank. Because of these responses, the Clerk of Court considered SF to be qualified to serve on a grand or petit jury, as signified by the notation on SF's qualification form. The Court has inspected the original questionnaire submitted by SF, and found nothing to indicate that he would not be qualified to serve as a juror. Therefore, there has not been substantial

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4. Counsel did not direct the Court's attention to the relevant statute until Defendant Young submitted his First Amended Motion for Judgment of Acquittal and Motion for New Trial — over two months after completion of the trial.

noncompliance with the applicable statutory provisions. Accordingly, Defendant is not entitled to the relief he requests, dismissal of the indictment without a showing of actual prejudice. *See* ***United States v. Okiyama***, 521 F.2d 601, 604 (9th Cir. 1975).

The incident described above which occurred during the venire voir dire is similar to the facts described in ***United States v. Rouco***, 765 F.2d 983, 988-990 (11th Cir. 1985). In both *Rouco* and the present case, the potential jurors stated that they were capable of reading "a little." In *Rouco*, the Eleventh Circuit refused to find abuse of discretion in the trial judge's determination that the juror sufficiently understood English. *Id.* In contrast to the present action, where SF was removed from the panel by preemptory strike, the juror in *Rouco* was actually selected to be a juror. *Id.*

The trial Court has the responsibility of removing a potential juror if he or she could not impartially evaluate the evidence and follow the court's instructions. ***Rouco***, 765 F.2d at 991. In determining whether a juror is qualified, a district court must exercise it's sound discretion subject only to the essential demands of fairness. *Id.* SF possessed the minimal qualifications to participate on a jury. He said that he was able to read some of the supplemental survey, he was able to fill out the original juror questionnaire, and he was articulate during the voir dire process. The Court is satisfied that if SF had been selected for the petit jury, then he would have been able to follow the testimony and arguments of counsel, and that any assistance that he may have required in reading documents in evidence would not have fundamentally affected his impartiality. *See* ***United States v. Gray***, 47 F.3d

1359 (4th Cir. 1995). Accordingly, the Court will not grant a judgment of acquittal or a new trial based on the qualifications of SF.

IV. Newly Discovered Evidence of Perjury

Defendants next contend that one of the government's witnesses, Terry Morrow, committed perjury. At trial Morrow testified that the only government assistance for which he is responsible under his plea agreement is testimony in the above-styled criminal action. Defendants claim that Morrow placed an advertisement in a May 2, 1997 magazine, which proves that he is still acting as a front man for a government investigation.

In raising this contention it seems that Defendants are seeking a new trial based on newly discovered evidence. To prevail on such a motion, a defendant must satisfy the following four part test: (1) the evidence must be newly discovered and have been unknown to the defendant at the time of trial; (2) the evidence must be material and not be merely cumulative or impeaching; (3) the evidence must be of the type that will probably produce an acquittal; and (4) the defendant's failure to learn of the evidence must not be the result of lack of diligence. ***United States v. Wilson***, 894 F.2d 1245, 1252 (11th Cir. 1990). The trial court should use "great caution" in granting a new trial based on newly discovered evidence. *Id.* Neither the Assistant United States Attorney nor the Postal Inspector assigned to this case have any knowledge of such cooperation by Morrow. Defendants' claim is very speculative, and they have not provided adequate evidence of perjury. Furthermore, this newly discovered

evidence is merely impeaching, and it is not the type of evidence that will probably produce an acquittal. Therefore, the Court will not disturb the jury's verdict.

V. Newly Discovered Expert Testimony

Defendants contend that Dr. John Parks, a Pediatric Endocrinologist at Emory would testify that the Tanner Scale, relied upon by the government's expert witness, was not intended to be used for forensic purposes. Defendants contend that the discovery of this evidence necessitates a new trial in which the government's expert is excluded. It does not, however, satisfy the four part test in *Wilson* because that test requires that the defendant's failure to learn of the evidence is not the result of a lack of diligence. A diligent investigation would have identified this expert before trial.

VI. Prosecutorial Misconduct

Finally, Defendants argue that error occurred during the prosecutor's closing argument. During her argument the Assistant United States Attorney said, "And Ladies and gentlemen, this man is begging the government to send him these tapes. The government, misconduct? Do you think if there was government misconduct the judge would let you hear this evidence?" (T.5 at 58) After the Defendants objected, the Assistant United States Attorney explained to the Court:

> My statement, judge, was if the government, if there has been government misconduct, which

> they have alleged throughout this, and arguing whether or not there was consent in this search, that, I said if the government had misconduct in it you would not allow the evidence in. Which is correct. You would not have allowed in the evidence on a motion to suppress if that had been an incorrect government action.

Id.

Prosecutorial conduct requires a new trial only if the remarks were improper and prejudiced the defendants' substantive rights. ***United States v. Cannon***, 41 F.3d 1462, 1466 (11th Cir. 1995). In this case, the prosecutor's remarks were improper because they may have been interpreted as implying that the presiding Judge had reached a conclusion that the defendant was guilty before trial and that the jury could consider this in making its decision.

In a similar case in which a prosecutor made an improper statement,[5] the Eleventh Circuit held that the statement was adequately handled by a curative instruction. ***United States v. Lopez***, 898 F.2d 1505, 1511-12 (11th Cir. 1990). In this case, after a brief exchange, in which the Court stated, "I think you all observed that I am neutral in the case," the Court offered the following curative instruction:

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5. In *Lopez*, the prosecutor said to the jury, "[l]adies and gentlemen, [defendant's counsel] wants to portray that this was some wild accusation with no safeguards until we got in here. He didn't tell you that the magistrate had to find probable cause for an arrest warrant." 898 F.2d 1505 (11th Cir. 1990).

Appendix G

> I have a role in criminal trials. In preliminary matters, and I carry out my duties and then the case either moves on or doesn't move on. And this case moved on and now it is in the jury's hands for them to pass their judgment and decide whether or not, whether or not the burden has been carried beyond a reasonable doubt.

(T.5 at 61) The curative instruction, however, did not completely satisfy the jury's curiosity about the search of Defendants' home. During their deliberation the jury addressed the following questions to the Court:

> cannot locate or determine exhibit # for form used to allow search of Young home — would like it
>
> also, if can be answered, if was voluntary, could Young have requested search be stopped
>
> does asking for a lawyer supersede voluntary consent to search

(Tab # 82); (T.5 at 109-10) In response to these questions, the Court stated:

> These are all legal questions that are, should be addressed to the court. And I must inform you that this court has previously ruled at a hearing that the search was legal. It was a legal search.
>
> So that doesn't mean that you can't consider the circumstances surrounding the search for, in

> arriving at a verdict any way you want to. The ramifications or implications or whatever of the search. But the question of whether or not these items where legally seized by the government has been answered already by the court. And the, as I said, the answer is everything that was seized on that, I think it was January 4, 1996, in Barnesville, Georgia, at the home, was legally seized.

(T.5 at 109-10). The Court's instructions mitigated the effects of the prosecutor's statements.

Also significant in the Court's analysis in *Lopez* was the fact that the improper remarks by the prosecutor occurred during rebuttal in response to improper remarks by the defense counsel. *Id.* at 512. During his summation, Defendant Young's attorney made the following argument: "They didn't have a search warrant. They had to device (sic) a ruse. They had to come up with, yet, another deception to try to search Mr. Young's house and that is what they did." (T.5 at 31) It was, of course, permissible for Defendants' attorneys to argue that the jury should discredit the testimony of the Postal Inspectors. The statement quoted above, however, made an issue of the legality of the search of Defendants' home. The Assistant United States Attorney suspected that the jurors would now be curious about the legality of the search and chose to deal with this in her summation. Her suspicion proved to be correct when the jury asked about the legality of the search. The Court was then able to clarify the jury's role in deciding this case. Defendants were not prejudiced by the prosecutor's statements.

Appendix G

VII. Conclusion

For the foregoing reasons, Defendants' motions for acquittal and, in the alternative, new trial are hereby **DENIED**.

SO ORDERED this 30 day of December, 1997

s/ Duross Fitzpatrick
DUROSS FITZPATRICK,
JUDGE
UNITED STATES DISTRICT
COURT

APPENDIX H — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA, MACON DIVISION DATED AND FILED JANUARY 16, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

5:96-CR-2 (DF)

UNITED STATES OF AMERICA,

VS.

LONNIE A. YOUNG, and
STEPHEN A. CARRUTHERS,

Defendants.

ORDER

Before the Court are Defendants' motions to suppress from evidence certain items that were found during a search of Defendants' home on January 4, 1996, and statements that were made during the course of the search. The Court held a hearing on these motions on January 14, 1997. The following are the Court's findings of fact and conclusions of law.

I. Findings of Fact

Sometime in 1993, the United States Postal Inspector became aware of Defendants' possible interest in child

pornography. Correspondence was established with Defendants, who share a residence, regarding the possible exchange of child pornography. As a result of this correspondence, Defendants requested that a videotape containing child pornography be sent to their post office box in Barnesville, Georgia.

The lead postal inspector in this investigation, Inspector Rushwin, supervised a "controlled delivery" of the videotape. The tape was left in Defendants' post office box only at times that Inspector Rushwin or another postal inspector would be present to witness one of the Defendants taking the videotape out of the post office box. As a result of this procedure, Inspector Rushwin, and two other postal inspectors, were present when Defendant Young removed the videotape from his post office box.

Inspector Rushwin then followed Defendant Young to Defendants' home and parked on a nearby street to watch the house. A few minutes later, Defendant Young emerged from his home and drove away. Inspector Rushwin radioed to another postal inspector, Dyer, and instructed him to stop Young.

Dyer stopped Young's car and ascertained that Young was unarmed. Defendant Young had been stopped for one or two minutes before Inspector Rushwin arrived. Upon arrival Inspector Rushwin informed and explained the Miranda rights to Defendant Young and provided a waiver form, which Defendant Young signed. Inspector Rushwin then informed Young of the child pornography investigation and questioned Young in the front seat of Inspector Dyer's

car. In total, Young was questioned in his car for less than half an hour. During this time Young asked to call his attorney. The Inspectors did not allow Young to use his cellular phone, but suggested that he try to contact his lawyer from his home.

Upon arrival at his home Young immediately attempted to place a telephone call to his attorney, but was unsuccessful. Thereafter, Young signed a consent form giving consent to a search of his home and his car. The consent form included the statement, "I know that I do not have to give consent, but I do this of my own free will without any promise or threat having been made to me." The search of Defendants home lasted from six to seven hours. During this time Inspector Rushwin questioned Defendant Young for at least two and one half hours about items that were discovered during the search. In response to these questions Defendant Young provided some possibly inculpatory statements. Defendant Young attempted to call his attorney several times throughout the evening and finally reached him sometime between 6:45 and 9:30 P.M.

From the time of the stop, Defendant Young felt that he was not free to leave although the Inspectors told him that he was free to go. During the search Defendant Carruthers wandered freely through his home and although Defendant Young was being questioned by Inspector Rushwin, he fixed himself a drink and used the telephone several times.

Appendix H

II. Conclusions of Law

Defendant alleges that the stop of Defendant Young in his car was an illegal stop that invalidates any subsequent admissions or seizures as unreasonable under the Fourth Amendment. This argument is without merit. The postal inspectors watched Defendant Young take possession of the videotape containing child pornography and they knew of correspondence with defendants that established their interest in obtaining such a tape. The Court finds that the stop was supported by probable cause. ***See United States v. Gonzalez***, 969 F.2d 999, 1002 (11th Cir. 1992).

At the hearing, Defendants claimed that Defendant Young's repeated requests to speak to a lawyer invalidated his consent to search his home. This argument seems to spring from either the Sixth or Fifth Amendment to the United States Constitution. The Court finds that neither amendment provides the relief sought by Defendants.

Because Young had not yet been indicted, his claim cannot rest on the Sixth Amendment right to counsel. It attaches after adversary judicial proceedings have been initiated against the defendant. ***United States v. Gouveia***, 467 U.S. 180, 187-88, 104 S.Ct. 2292, 2297 (1984).

The Fifth Amendment would not exclude the items seized from the Defendants' home, *see* ***United States v. Hidalgo***, 7 F.3d 1566, 1568 (1993) (the Fifth Amendment protects only against compelled incriminating evidence of a testimonial or communicative nature, and not against compelled production of physical evidence), however, it

could protect incriminating statements made by Defendant Young during the search. The United States Supreme Court decision in ***Miranda v. Arizona*** provided safeguards for the Fifth Amendment privilege against self incrimination. The decision arose from concerns about the possible abuses of custodial interrogation. Thus *Miranda's* protections are only triggered by custodial interrogation.

In this case Defendants were not in custody. To determine whether a defendant was in custody the Court must determine whether under the totality of the circumstances, a reasonable person in the suspect's position would feel restrained in his freedom of movement to such extent that he would not feel free to leave. ***United States v. Phillips***, 812 F.2d 1355, 1360 (11th Cir. 1987). The Supreme Court has held that whether a suspect is in custody turns on whether restrictions on the suspect's freedom of movement are "of the degree associated with formal arrest." ***Minnesota v. Murphy***, 465 U.S. 420, 430, 104 S.Ct. 1136, 1144 (1984). In the case at bar, Defendant Young was told that he was free to leave, both defendants walked freely through their own home during the search, and Young used the phone and fixed drinks at his pleasure. The Court finds that the Defendants were not in custody. Thus *Miranda* does not apply.

The admissibility of the evidence seized from Defendants' home hinges on whether consent to the search was voluntarily given. The Fourth Amendment test for valid consent to search is that the consent be voluntary and "voluntariness is a question of fact to be determined from all of the circumstances." ***Schneckloth v. Bustamonte***, 412 U.S. 218, 93 S.Ct. 2041 (1973).

Appendix H

Defendant Young testified that he did not fully understand that he had a right to refuse the request to search his home or that he could ask the inspectors to stop searching once they had started. In *Schneckloth* it was argued that consent could not be valid unless the defendant knew that he had a right to refuse the request. However, the Supreme Court rejected that argument: "While knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the sine qua non of an effective consent." 412 U.S. 218, 93 S.Ct. 2041 (1973). At the suppression hearing, Defendant Young's testimony made it clear that he understood that he could refuse to give consent, but he did not understand the possible legal benefits that could stem from this refusal — namely the operation of the exclusionary rule. Such a complete understanding of the legal system is not required. What is required is that Defendant understood that he had a right to say "no" to the request to search. The Court finds that he did.

Defendant Young claims that the postal inspectors improperly asserted their authority to coerce Young into giving consent. Inspector Rushwin told Young that if consent to search was not given, the inspectors would secure the house while others obtained a search warrant. While the Court acknowledges that such a statement would be intimidating, it alone does not constitute coercion sufficient to make consent involuntary. *See* ***United States v. Momodu***, 909 F.Supp. 1571, 1580 (N.D. Ga. 1995) (holding that an officers statement that he would remain with defendant until a search warrant was secured is a factor which strongly suggests that the defendant's consent was not given freely).

Appendix H

The Court finds that the coercive effect of the inspector's reference to an imminent search warrant was mitigated by other factors which must be considered in a totality of the circumstances analysis. The Court considers the following factors significant: Defendant Young is an adult, he is a professional educator with a master's degree, questioning of defendants was non-custodial in nature, consent was given in the defendants' home, Defendant Young signed a form indicating that he did not have to give consent, the police did not falsely claim the possession of a warrant, and the police did not brandish their weapons or make any other intimidating acts towards Defendants. *See* ***United States of America v. Two Hundred Eighty Thousand Five Hundred and Five Dollars, In U.S. Currency***, 655 F.Supp. 1487, 1498 (11th Cir. 1986). Therefore, the Court finds that the consent given by Defendant was freely and voluntarily given.

Accordingly Defendants' motions to suppress are hereby **DENIED**.

SO ORDERED, this 16 day of January, 1997.

s/ Duross Fitzpatrick
DUROSS FITZPATRICK, JUDGE
UNITED STATES DISTRICT COURT

APPENDIX I — PER CURIAM ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED SEPTEMBER 12, 2000

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-8180-AA

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LONNIE A. YOUNG,
STEPHEN A. CARRUTHERS,

Defendants-Appellants.

On Appeal from the United States District Court
for the Middle District of Florida

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC
(Opinion _____, 11th Cir., 19__, __ F.2d __).

Before: TJOFLAT, WILSON, and FLETCHER*, Circuit Judges.

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* Honorable Betty B. Fletcher, U.S. Circuit Judge for the Ninth Circuit, sitting by designation.

Appendix 1

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ [illegible]
UNITED STATES CIRCUIT JUDGE